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# Blackstonian Marriage, Gender, and Cohabitation

Naomi Cahn & June Carbone\*

In *Blumenthal v. Brewer*,<sup>1</sup> the Illinois Supreme Court held that it would not enforce an alleged agreement between a nonmarital couple that centered on their relationship. The National Center for Lesbian Rights argued that the court's holding punished people who entered into a nonmarital relationship.<sup>2</sup> Nancy Polikoff found the opinion "shocking."<sup>3</sup> Albertina Antognini suggests that nonmarriage cases refusing to enforce such agreements harm women.<sup>4</sup> These accusations also reflect concern that *Blumenthal*-type results are designed to encourage marriage and penalize others.<sup>5</sup>

Our analysis of *Blumenthal* and the nonmarriage cases starts from a different place. We think that the *Blumenthal* approach may not be entirely evil, even though we think *Blumenthal* itself raises issues about the retroactive application of these principles to people who could not marry at the time they began their relationship.<sup>6</sup>

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1. 69 N.E.3d 834, 853 (Ill. 2016).

2. Defendant-Appellee Eileen M. Brewer's Petition for Rehearing at 4, *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016) (No. 10 CH 48730), <http://www.ncrlrights.org/wp-content/uploads/2016/09/2016.09.07.-Brewer-Pet-for-Rehearing.pdf> [<https://perma.cc/3SAC-U357>].

3. *Illinois Supreme Court Deals Major Setback to Unmarried Couples; Its Effect on Gay Couples*, RAINBOW TIMES (Aug. 18, 2016), <https://www.therainbowtimesmass.com/illinois-supreme-court-deals-major-setback-to-unmarried-couples/> [<https://perma.cc/YBG6-SZ83>].

4. Professor Antognini notes that a shortcoming in current decisions is that "if a woman seeks property in exchange for services, then she should marry." Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 10 (2017).

5. See, e.g., Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1247–48 (2016) ("*Blumenthal* makes clear *Obergefell*'s threat to nonmarital relationship recognition. First, *Obergefell* furnishes a constitutional rationale for states to prioritize and privilege marriage above nonmarital relationships . . . [I]f marriage is the most profound and meaningful relationship available to adults, the state has a legitimate basis for promoting marriage and its many benefits over nonmarital alternatives."); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2021 (2018) ("To encourage marriage, these states impose what could be considered penalty default rules . . .").

6. See *Blumenthal*, 69 N.E.3d at 869 (Theis, J., dissenting upon denial of rehearing).

Prospectively, our approach to nonmarital relationships rests on the principle that such relationships should be seen as one of a continuum of possible types of intimate relationships,<sup>7</sup> and their legal regulation should reflect the parties' intentions in entering into them, intentions that are shaped by differing community norms.<sup>8</sup> Central to such an approach are assumptions about the concept of equality between partners and between marital and nonmarital couples. At one time, marriage was conceived of as an intrinsically hierarchical institution necessary to protect women from the stigma and impoverishment associated with nonmarital sexuality. In that context, nonmarital relationships were associated with shame in some cases and, in others, the desire to craft more egalitarian unions.

Today, at a time when more than nine million people have entered into nonmarital unions<sup>9</sup> and when women enjoy access to the means of self-support (albeit not full equality),<sup>10</sup> the nature of nonmarital unions has

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7. As Gregg Strauss notes, while “[m]any claim *Obergefell*’s reasoning insults nonmarital families by implying their family lives are less valuable,” this is not necessarily true: “[u]nless one assumes values are exhaustive and exclusive, then marriage, exclusive cohabitation, open relationships, extended families, and communal commitments can all be objectively valuable.” Gregg Strauss, *What’s Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 655–56 (2018).

8. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 97–98 (2016) [hereinafter *Nonmarriage*] (describing how expectations about parental involvement vary by race and class); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 298–99 (2015) (describing norm creation as an iterative process). Edin and Nelson, for example, observed that historically, marriage and parenting were a “package deal;” men who did not marry the mother of their children did not expect to play a role in the child’s life. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 95 (2013). Today, however, unmarried fathers are more likely to remain involved in the child’s life, but mothers expect to have primary custody after the parents part, and both mothers and fathers see the father’s role as dependent on cooperation with the mother. See *id.* at 94–96; NANCY E. DOWD, *REDEFINING FATHERHOOD* 3 (2000) (describing fathers’ role as dependent on a cooperative relationship with the mother). African-American communities, however, have institutionalized this role outside of marriage to a greater degree than whites. See Calvin Z. Ellerbe et al., *Nonresident Fathers’ Involvement After a Nonmarital Birth: Exploring Differences by Race/Ethnicity* 9–10, 20, 22 (Fragile Families & Child Wellbeing Study, Working Paper WP14-07-FF, 2014), <https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/wp14-07-ff.pdf> [<https://perma.cc/QZU2-AGFT>]. The fathers’ involvement in these communities does not necessarily correspond to the existence of formal custodial orders. See Patricia Brown & Steven T. Cook, *Children’s Placement Arrangements in Divorce and Paternity Cases in Wisconsin*, INST. FOR RESEARCH ON POVERTY 2, 9–12, 18–19 (Nov. 2012), [https://www.irp.wisc.edu/wp/wp-content/uploads/2018/06/Task4A\\_CS\\_09-11\\_Final\\_revi2012.pdf](https://www.irp.wisc.edu/wp/wp-content/uploads/2018/06/Task4A_CS_09-11_Final_revi2012.pdf) [<https://perma.cc/28TX-4CED>].

9. A.W. Geiger & Gretchen Livingston, 8 *Facts About Love and Marriage in America*, PEW RES. CTR. (Feb. 13, 2019), <http://www.pewresearch.org/fact-tank/2018/02/13/8-facts-about-love-and-marriage/> [<https://perma.cc/M8S9-VWF2>].

10. *Facts Over Time - Women in the Labor Force*, U.S. DEP’T OF LABOR, [https://www.dol.gov/wb/stats/NEWSTATS/facts/women\\_lf.htm#one](https://www.dol.gov/wb/stats/NEWSTATS/facts/women_lf.htm#one) [<https://perma.cc/LC6R->

changed. The stigma is gone and the reasons for entering into them have become much more varied, defying any cookie cutter approach to their legal regulation. We therefore argue that it is a mistake to assume that nonmarital relationships should necessarily generate the same legal consequences as marital ones or that a failure to generate the same legal consequences is somehow a penalty designed to discourage nonmarital relationships. Instead, legal regulations should follow from the nature of the relationships as they stand on their own terms, without a presumption that they rest either on interdependence between two partners making equal contributions or dependence arising from the assumption of gendered roles.

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Blackstonian marriage was premised on distinct roles for men and women, and women's intrinsic dependence because of them. Women may have been a "favorite,"<sup>11</sup> but they were subordinated to their husbands during marriage, could not own property, and were barely capable of committing their own crimes. The fight for marriage equality could prevail only because, as Justice Kennedy recognized, marriage has moved far beyond an identification with such hierarchal and gendered roles. Even without accepting his elegiac and unrealistic vision of marriage,<sup>12</sup> it is important to recognize that the legal regulation of marriage now treats spouses as equal and interdependent actors, who elect to enter their unions as an act of self-definition. While this "role-colored" vision of marriage certainly does not describe all marriages, it nonetheless influences the creation of the legal regime that governs the institution. This raises the question that many of us are continuing to explore, which is how to separate nonmarriage from marriage and ensure that nonmarriage remains a distinct status.

The answers to that question diverge, even among those of us who are feminists. Some suggest that nonmarital partners should be entitled to many of the same rights as marital partners, arguing, for example, that any other

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6PME?type=image]. *But see* JUNE CARBONE, NAOMI CAHN & NANCY LEVIT, *SHAFTED: WHY WOMEN LOSE IN A WINNER-TAKE-ALL WORLD* (forthcoming 2020) (manuscript on file with authors).

11. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*421, \*430–433; Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497–98, 1497 n.161 (2009).

12. Melissa Murray tartly notes: "If this rose-colored vision of marriage is at odds with the experiences of those who are divorced, in marriage counseling, or in abusive marriages or families, Justice Kennedy and the majority stubbornly refuse to admit the disjunction." Murray, *supra* note 5, at 1213–14.

outcome privileges marriage and deprives nonmarital partners.<sup>13</sup> Others of us argue that the very reason to celebrate nonmarriage and retain its distinct status is to ensure that marital privileges are not unjustly imposed, and that couples who do not want what marriage entails are free to create different types of relationships.

This article embraces that second set of arguments. We begin by noting that equal relationships are different from unequal ones. Intimate, heterosexual relationships were once viewed as intrinsically unequal because sexual relations necessarily involved women's risk of pregnancy, and only men could realistically expect to be able to generate the resources necessary to support a family. Both assumptions have changed. With the availability of reliable contraception and abortion, all couples who wish to do so can prevent childbearing.<sup>14</sup> In addition, women are no longer either economically dependent because of gender or childbearing per se, nor necessarily the lower-earning spouse in intimate relationships.

These realities have changed the foundation for the legal regulation of intimate relationships. Family law no longer needs to protect women as intrinsically dependent or to treat childbearing as the ultimate goal of intimate relationships. Instead, two distinctions become more important. The first is the difference between committed relationships, where the parties become interdependent, commingle resources, share decision-making and assume joint responsibility for children and other shared undertakings, versus contingent relationships, where the parties retain substantial financial and emotional independence. The second is the difference between relationships premised on equality, which involve equal respect and decision-making power within the relationship, versus relationships premised on inequality, with one party having dominant economic or decision-making power.

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13. E.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 239–40 (2015) (favoring greater emphasis on shared custody for unmarried couples); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 147 (2014); Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1573–74 (2016) (arguing for structures to establish the expectation of joint parenting at birth); see Murray, *supra* note 5, at 1258 (“[A] victory for marriage equality comes at the expense of the unmarried and nonmarriage. . . . [T]he decision . . . has strong potential to embed this inequality into the structure of constitutional law, reneging on the promise of constitutional protection for nonmarital life that was threaded through the jurisprudence of nonmarriage.”); Stolzenberg, *supra* note 5, at 2050.

14. We recognize that some couples may wish to forego use of contraception and abortion but assume that those who consciously choose to do so may also wish to include provisions for childrearing as a condition for their intimate unions. See Ross Douthat, *Red Family, Blue Family*, N.Y. TIMES (May 9, 2010), <http://www.nytimes.com/2010/05/10/opinion/10douthat.html> [<https://perma.cc/4AHB-QJZ5>].

The law of marriage has dealt with these distinctions by creating default rules that presume that marriage is based on commitment and interdependence, and equal contributions,<sup>15</sup> while allowing room for other types of marital relationships expressed through premarital or other types of express agreements. The law of nonmarriage addresses these issues inconsistently, with considerable tension.<sup>16</sup> The states vary in the degree to which they recognize nonmarital relationships at all and the extent to which they impose obligations, ratify agreements, untangle intertwined finances, or largely leave the couples the way they find them at the dissolution of the relationship.<sup>17</sup> By contrast, the ALI (American Law Institute) treats long-term, unmarried couples as financially equal and interdependent, unless they opt-out of marriage-like property provisions.<sup>18</sup> At the same time, the ALI creates multiple parental statuses, attempting to recognize functional relationships important to the child's interests, while leaving room for less equal custody decision-making.<sup>19</sup>

Even when states extend legal recognition to the existence of the relationships, they have yet to grapple with the multiple reasons that guide the decisions of modern couples to live together in informal relationships.<sup>20</sup>

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15. Because married women typically earn less than married men, marriage remains financially tilted towards men. Because married women disproportionately perform child care, the caretaking functions remain tilted towards women. The law, however, presumes equal contributions through equitable division at divorce and a spousal elective share, and increasing presumptions of joint custody. See generally *Nonmarriage*, *supra* note 8, at 120–21.

16. The development of the doctrine of de facto parentage shows these tensions. See, e.g., Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 32–33 (2018); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 601–02 (2018); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265–66 (2017).

17. Compare *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 59 (refusing to enforce agreements that “closely resemble those arising from conventional marriages”), with *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000) (imposing a community property regime on unmarried couples who commingle their lives and finances).

18. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 819 (2005); Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305 (Robin Fretwell Wilson ed., 2006) [hereinafter *Summarizing ALI Principles*].

19. PRINCIPLES OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.08–.09 (AM. LAW INST., 2002). For some of the dangers of equal custodial decision making, see Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311, 331–32 (2017).

20. Like Albertina Antognini, we are concerned about developing law based on “exceptional” cases. See Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1895 (2018). The different types of arrangements between nonmarital couples leads to questions of just which ones are unexceptional. In addition, these issues involve questions of differences across race, class, and regions. See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1039 (2018) (describing demographic differences among cohabitants).

In particular, the legal provisions have not dealt with the fact that there are four paradigmatic couples who choose to live together without marrying, and the needs of these couples are at odds with each other. The first group consists of couples who have become financially interdependent, share decision-making, and have undertaken mutual responsibilities (equal and committed). In many ways, these couples are otherwise indistinguishable from married couples. This group is in the best position to enter formal agreements or other legal arrangements ordering their relationship, but as the *Blumenthal* couple illustrates, even the sophisticated couples in this group do not always do so with respect to every aspect of their relationship.<sup>21</sup>

The second group are couples in contingent relationships, typically without children. Although this group may involve two equals, they have not made a commitment to each other or to a fully interdependent relationship; their relationship is accordingly characterized by equal respect and equal contributions, but financial independence and autonomous decision-making (equal and contingent).

The third group involves more traditional couples in which one party earns or has substantially greater resources than the other and has assumed a commitment to the other partner. This group involves neither equality within the relationship nor fully shared decision-making, but it does involve mutually understood obligations to what may be a financially dependent partner. The states generally enforce express agreements in this context, but the majority do not infer such obligations from the nature of the relationship itself (unequal and committed).<sup>22</sup>

The fourth group, which generates the bulk of the controversy, are those relationships characterized by dependence, but neither unequivocal commitment nor equal status. In these cases, one partner may be better off than the other, and the second partner may, either from the beginning of the relationship or over the course of time, have come to depend on the wealthier partner's superior resources. This group includes both couples where the dependence occurs because of the relationship, e.g., where a party gives up employment to care for children, and where the inequality exists at the beginning of the relationship, as in the case of actor Lee Marvin and Michelle Triola (unequal and uncommitted).<sup>23</sup>

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21. And the reasons for not formalizing their relationships range from a belief that there is no need to do so to the lack of availability of marriage or civil union status.

22. See *In re Estate of Roccamonte*, 808 A.2d 838, 841–42 (N.J. 2002).

23. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976). The California Supreme Court identifies Michelle Triola Marvin as “Plaintiff” or as “Woman,” *id.* at 106, but this Article will identify her as Michelle Triola, see *Marvin v. Marvin*, 176 Cal. Rptr. 555, 555 (Cal. Ct. App. 1981).

These unmarried relationships are far more varied than marital ones, and the two cohabitants in any particular relationship do not necessarily share the same understandings about the terms of their relationships. In addition, the four groups of cohabitants we have described above are likely to differ substantially from each other in important demographic respects.

These groups clearly do not fit within a one-size-fits-all model of nonmarital relationships nor do nonmarital couples neatly sort into the four groups, as these categorizations may shift for a particular couple over time. This makes the construction of legal rules to fit these relationships challenging. We argue below that the most numerous groups who choose not to marry, whether consciously or by default, choose not to do so because their relationships lack either equality or a commitment to interdependence, and in some cases both. It is therefore inappropriate to impose on unmarried couples as a group marriage-like commitments that presume equality and interdependence.

In short, our argument is that, in the past, the opposition to recognition of nonmarital relationships was based initially on the intrinsic dependence of women, or, in later years, to protection of same-sex partners who could not marry. But this “women as victim” narrative is more complicated today for two reasons. First, many of today’s nonmarital relationships do not fit the stereotype of dependent women, wealthier man. Second, even when they do, imposing obligations because of cohabitation per se has consequences that go beyond the circumstances of the individual couple. The effect is to take one of the four groups we delineated above and to make it the paradigm case for all nonmarital relationships. The result is deeply ironic. At a time when marriage has become an institution premised on formal equality, this approach makes nonmarriage one premised on an assumption of inequality; that is, an assumption that lower-earning partners need protection much like the women in the Blackstonian marriages of old. Moreover, in doing so, it fails to distinguish two very different circumstances: one in which a higher-earning partner fails to commit to a partner who has become dependent *because* of the circumstances of the relationships and one where a partner refuses to commit because the other partner was *never* capable of making equal contributions to the relationship. In the abstract, the distinction between these two relationships can be difficult to determine, but as a demographic matter, they correspond closely to relationships identified in terms of the intersection of class and gender.

Parts I and II explore the legal issues that frame nonmarital relationships. Part III argues that, while nonmarital couples should be able to enter into contracts based on their relationship that are then enforceable, imposing status-based obligations does not adequately recognize the variations in these



relationships. It recommends the development of French, PACS-style options for nonmarital couples and the enactment of designated beneficiary statutes as an alternative as well as recognition and enforcement of contractual arrangements based on, and in, the relationship.<sup>24</sup>

#### I. THROWING BRICKBATS AT *BLUMENTHAL V. BREWER*

In 2016, the Illinois Supreme Court, in *Blumenthal v. Brewer*, revisited and reaffirmed its long-standing refusal to recognize common law claims based on “marriage-like” relationships. The opinion is easy to disparage. It adopts language insisting on a bright line distinction between married and unmarried relationships and concludes that it is well-settled Illinois policy that “the state [has] a strong continuing interest in the institution of marriage and the ability to prevent marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”<sup>25</sup> Invoking the Supreme Court’s *Obergefell* opinion as evidence of the continuing importance of marriage, the *Blumenthal* decision appeared to vindicate *Obergefell* critics’ fears that Kennedy’s paean to marriage would furnish “a constitutional rationale for states to prioritize and privilege marriage above nonmarital relationships.”<sup>26</sup> It seems to deny any of the “spaces in between” the binary of marriage and nonmarriage through its failure to recognize, regulate and support an intermediate status short of marriage itself.<sup>27</sup> While *Blumenthal*’s rhetoric goes further than most states in privileging marriage, the fact is that relatively few states would give Brewer a share of Blumenthal’s medical practice, including those that express greater support for cohabitation agreements.<sup>28</sup> What the case fails to do, however, is to illuminate the policies on which those decisions are based. To understand why, it is necessary to reexamine *Blumenthal* itself.

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24. One of the criticisms of designated beneficiary and comparable statutes is the lack of usage. In 2010, there were two PACS for every three marriages. Scott Sayare & Maïa de la Baume, *In France, Civil Unions Gain Favor over Marriage*, N.Y. TIMES (Dec. 15, 2010), <https://www.nytimes.com/2010/12/16/world/europe/16france.html> [https://perma.cc/K659-CBNR].

25. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 58 (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979)).

26. Murray, *supra* note 5, at 1247; see also Joslin, *Nurturing Parenthood Through the UPA* (2017), *supra* note 16, at 595.

27. Courtney Cahill, *The Space in Between*, JOTWELL (June 12, 2019), <https://family.jotwell.com/the-space-in-between/> [https://perma.cc/VM8C-M5EA].

28. See *Nonmarriage*, *supra* note 8, at 64–68 (providing an overview of cases examining the theory of unjust enrichment in the context of unmarried couples).

The opinion is easy to dislike, in large part because it is in so many ways a backward-looking decision.

First, the facts of the case, which describe the relationship between the parties, Eileen Brewer and Jane Blumenthal, look back to a period when same-sex couples could not legally marry in Illinois. This simultaneously makes the outcome a denial of the reality of their relationship and a poor model for grounding the approach to future nonmarital relationships because all of the indications are that if the couple had been able to marry, they would have done so.<sup>29</sup> They took numerous steps indicating that intent. Early in their twenty-nine-year relationship, they “exchanged rings as symbols of their lifelong commitment to each other and presented themselves to their families and friends as a committed couple.”<sup>30</sup> In 2002, they cross-adopted their three children, which required undergoing a home study.<sup>31</sup> When Cook County created a “Domestic Partner Registry,” they filed an affidavit declaring in 2003 that they had been domestic partners since 1981 and they were “responsible for each other’s common welfare.”<sup>32</sup> In 2005, they took out a marriage license in Massachusetts, though they did not marry there and, even if they had, the marriage would not have been recognized in Illinois.<sup>33</sup> In short, the couple’s relationship is more typical of marital than nonmarital unions because of the commitment, interdependence, and efforts to acquire legal recognition. And while the case thus presents a question of justice for same-sex couples who were denied the right to marry, the facts of the case do not present a realistic foundation for addressing how unmarried couples should be treated in the future.

The second factor contributing to the backward-looking nature of the opinion is its reliance on dated Illinois legal history. The leading, some would say infamous, case in Illinois before *Blumenthal* had been the 1979 case of *Hewitt v. Hewitt*.<sup>34</sup> Victoria Hewitt, the plaintiff in that case, had become pregnant in 1960 when she and Robert Hewitt were college students at Grinnell. That was the year in which the shotgun marriage was at its height—30% of brides gave birth within eight and a half months of the nuptials, a

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29. Our assumption is that they would have done so, given how they lived their lives. See Jeffrey M. Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, GALLUP (June 22, 2017), <https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx> [<https://perma.cc/FV69-KLM6>] (finding the lesbian marriage rate is up and the cohabitation rate is down). And that’s why the case is wrongly decided.

30. *Blumenthal v. Brewer*, 2014 IL App (1st) 132250, ¶ 3, *vacated in part, rev’d in part by Blumenthal*, 2016 IL 118781 at ¶ 89.

31. *Id.* at 171.

32. *Id.*

33. *Id.* at 172.

34. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

percentage previously seen in 1800.<sup>35</sup> The appropriate response to a pregnancy *was* marriage; back alley abortions were illegal and dangerous and only 5.3% of total births in the United States were to unmarried women (even less for white college students like Victoria).<sup>36</sup> If she and Robert didn't manage to pull off the ceremony before her pregnancy began to show, they might experience considerable embarrassment. Robert, for whatever reason, convinced her that the solution was to just tell people that they had eloped.

When the relationship ended, decades later and after three children, she filed for "divorce," alleging that Robert persuaded her to live as though they were married, and she "devoted her entire efforts to assisting in the completion of defendant's professional education and the establishing of his successful practice of pedodontia," even asking her parents for financial help.<sup>37</sup> She wanted what she had been promised—the same terms available through marriage.

By that time, the California Supreme Court had issued its landmark *Marvin* decision. That decision rejected longstanding case law that treated agreements made in the context of unmarried intimate relationships as void as against public policy, and instead upheld the enforceability of express or implied contracts growing out of the relationships, so long as sex was not the explicit consideration for the promises. Although Michelle Triola never received relief herself, the decision appeared to touch off a revolution in the treatment of nonmarital cohabitation.<sup>38</sup>

The Illinois Supreme Court, however, rejected the *Marvin* ruling, saying no to Victoria Hewitt, because of the public policies favoring a bright line distinction between those who enter into a state-sanctioned relationship (marriage) and those who do not.<sup>39</sup> The court expressly found that couples could not create legally enforceable "marriage-like" relationships entirely on their own, holding that the legislature had settled the matter when it abolished recognition of common law marriages entered into after 1905. Victoria had every right to feel betrayed. After all, had she insisted on marriage in 1960, Robert probably would have married her, and in that era, he could not have the benefit of her contributions to his dental practice and a relationship with his children without doing so.

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35. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 79 (2010) [hereinafter RED FAMILIES].

36. CHILD TRENDS, BIRTHS TO UNMARRIED WOMEN: INDICATORS ON CHILDREN AND YOUTH 3 (2015) [https://www.childtrends.org/wp-content/uploads/2015/03/75\\_Births\\_to\\_Unmarried\\_Women.pdf](https://www.childtrends.org/wp-content/uploads/2015/03/75_Births_to_Unmarried_Women.pdf) [<https://perma.cc/STP8-8AY2>].

37. *Hewitt v. Hewitt*, 380 N.E.2d 454, 456 (Ill. App. Ct. 1978), *overruled by Hewitt*, 394 N.E.2d at 1211.

38. *Marvin v. Marvin*, 557 P.2d 106, 122–23 (Cal. 1976).

39. *Hewitt*, 394 N.E.2d at 1211.

Today, virtually everything about this relationship would have been different. Victoria would have been able to prevent a pregnancy through use of contraception, and she could have had an abortion had that failed.<sup>40</sup> Had she continued an unplanned pregnancy, she and Robert could have timed the marriage with less concern about stigma, and she would have been much more likely to pursue a career, particularly if Robert refused to marry her.<sup>41</sup> Their case is even more exceptional in today's terms than *Blumenthal* and *Brewer*'s.<sup>42</sup>

The *Blumenthal* court reiterated that nothing had changed legally since its 1979 opinion, declaring that "our decision in *Hewitt* did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits."<sup>43</sup> The court acknowledged the societal changes in intervening years that provided greater acceptance of nonmarital relationships and removed much of the stigma associated with nonmarital sexuality.<sup>44</sup> It nonetheless emphasized the state interest in regulating intimate unions and rejecting the ability of the parties to create marriage-like rights as a matter of private agreement or to treat state-sanctioned unions as private arrangements "terminable at will."<sup>45</sup> It thus underscored the continuing state interest in distinguishing marital from nonmarital unions as a matter of public policy,

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40. See RED FAMILIES, *supra* note 35, at 77–105 (summarizing the impact of contraception and abortion on changes in family formation); Elaine Godfrey, *What It Means To Defund Planned Parenthood*, ATLANTIC (Mar. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/03/defunding-planned-parenthood-in-iowa/520674/> [<https://perma.cc/K2VL-MBME>] (discussing the effects of changing contraception and abortion laws in Iowa).

41. See RED FAMILIES, *supra* note 35, at 120–21, 194 (noting change in the percentage of mothers who work outside the home).

42. Relationship fraud, however, exists in different ways in every era but has rarely been actionable. See JILL ELAINE HASDAY, *INTIMATE LIES AND THE LAW* 3 (2019).

43. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 61.

44. *Id.* at ¶ 58 n.1 (citation omitted) ("The *Hewitt* court also questioned and considered the history of whether granting legal rights to cohabiting adults would encourage "what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships" which could weaken the institution of marriage. Today, this court does not share the same concern or characterization of domestic partners who cohabit, nor do we condone such comparisons. Nonetheless, as explained herein, a thorough reading of *Hewitt* makes clear that the core reasoning and ultimate holding of the case did not rely nor was dependent on the morality of cohabiting adults.").

45. *Id.* at ¶ 81.

privileging the institution of marriage and deferring to the legislative process for any substantive change.<sup>46</sup>

Moreover, while the court upheld the ability of the parties to contract between themselves and to pursue unjust enrichment and restitution claims, it rejected such claims where the parties could not show that such claims had “an independent economic basis apart from the parties’ relationship.”<sup>47</sup>

The *Blumenthal* majority, in its reliance on *Hewitt*, thus failed to address nonmarital relationships on their own terms, refusing to impose or imply terms replicating the marital bargain.

A spirited concurrence/dissent revisited the rationale the *Hewitt* court used as the basis for this doctrine. Justice Theis noted that *Hewitt* insisted that to be valid, sexual relations could not be part of the consideration for the agreement, decrying “the naivete . . . involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity.”<sup>48</sup> The dissent, while agreeing that the courts should not attempt to revive common law marriage, nonetheless objected that the majority’s description of the basis for contractual or restitutionary claims was too narrow. Given that at the time of the *Hewitt* decision, fornication still violated Illinois law, the dissent saw no reason to continue to require a showing of “an independent economic basis apart from the parties’ relationship.” It argued that nonmarital partners should be able to “bring the same common-law claims available to other people.”<sup>49</sup>

That is comparable to the result in *Marvin*,<sup>50</sup> which the *Hewitt* majority had considered and rejected. In *Marvin*, the California Supreme Court did not require that the parties demonstrate an independent economic basis apart from the parties’ relationship for an express or implied agreement to be enforceable. Instead, the court ruled that such an agreement “even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement.”<sup>51</sup> The difference between the two cases thus affects not only the

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46. The court stated for example: “now that the centrality of the marriage has been recognized as a fundamental right for all, it is perhaps more imperative than before that we leave it to the legislative branch.” *Id.*; see also *Gunderson v. Golden*, 360 P.3d 353, 355 (Idaho Ct. App. 2015) (observing that “[t]he elimination of common-law marriage, supported by an explicit public policy justification, commands our courts to refrain from enforcing contracts in contravention of clearly declared public policy and from legally recognizing co-habitational relationships in general”).

47. *Blumenthal*, 2016 IL 1188781, at ¶ 73.

48. *Id.* at ¶ 99 (Theis, J., concurring in part and dissenting in part).

49. *Id.* at ¶ 114.

50. *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976).

51. *Id.* at 114.

substance of the Illinois standard requiring an independent economic basis for an alleged agreement to share assets or expenses, but the burden of proof. In Illinois, a party like Brewer bringing a common law action has the burden of showing that the matter was independent of the parties' agreement to live together; in California, Brewer would only have had to show that the sexual acts were independent of the parties' agreement.

Nonetheless, as Ira Ellman argued, a quarter century after the *Marvin* decision, courts purporting to follow *Marvin* almost never find express agreements, partly because few parties enter into them,<sup>52</sup> and they have largely been unwilling to imply agreements, even where the parties lived together and commingled their affairs in a manner similar to Blumenthal and Brewer.<sup>53</sup> Part of the reason is that parties in such cases can often credibly claim that they did not share the same assumptions about the nature of their relationship. In one California case following *Marvin*, for example, the lower-earning partner testified that the parties had agreed that they would treat their relationship as though they were married.<sup>54</sup> The higher-earning partner testified, however, that the couple had never discussed the concept of support after separation. He stated, "That was not part of our life. It was not part of what we were doing . . . [W]hen we split up, we split up."<sup>55</sup> In other words, he stated that the parties' had no lasting commitment to each other, much less an agreement promising to take care of each other after the relationship ended. The dissent, in contrast, emphasized the facts that should have led to an implied contract on the basis of the parties' relationship. The case was particularly compelling because the plaintiff had followed her partner to Alaska, taken care of their children, supported him through law school, and suffered a disabling injury over the course of the relationship. Judge Poche's dissent concluded that:

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52. Cf. *Maguire v. Coltrell*, No. CV-14-01255-PHX-DGC, 2015 WL 6168417, at \*4 (D. Ariz. Oct. 21, 2015) (finding that parties did not show existence of agreement or joint venture and partner's contribution to living expenses was part of their cohabitation arrangements and demonstrated neither a partnership agreement to pool resources nor a basis for unjust enrichment). But see *Cook v. Cook*, 691 P.2d 664, 667 (Ariz. 1984) (observing that "[a]lthough isolated acts of joint participation such as cohabitation or the opening of a joint account may not suffice to create a contract, the fact finder may infer an exchange of promises, and the existence of the contract, from the entire course of conduct between the parties."); *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992) (recognizing implied agreement to treat couples' joint assets as community property).

53. See Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367–69 (2001).

54. *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 894 (Ct. App. 1993). (finding that "[r]espondent and appellant did not believe that a license for marriage was necessary to bond together in a lifetime commitment. Thus, they vowed to be husband and wife and to strive to be partners in all respects 'without any sanction by the State.'")

55. *Id.* at 895 (internal quotation marks omitted).

If [twenty-one] years of living together in a mutually supportive family relationship, of taking title to property and otherwise conducting one's financial affairs as if one were married is insufficient evidence of an implied contract to conduct oneself as married with all the moral and legal obligations to the other spouse that such a relationship entails, then I simply cannot imagine any relationship which the majority would find sufficient.<sup>56</sup>

Ellman concludes that Justice Poche's reasoning may have been the point of the post-*Marvin* line of cases; explicit agreements are fine, but implied ones are not to be assumed on the basis of the relationship itself.<sup>57</sup> As a practical matter, this would require either that the couple put their agreement in writing or that they specifically assented (and could later prove their assent) to particular terms such as financial support after dissolution of the relationship.

It is striking therefore that the *Blumenthal* court, in spite of its more hostile rhetoric and legal reasoning, nonetheless resolved the parties' financial claims in similar ways to other states.<sup>58</sup> It allowed the partition claim to proceed, resolving the parties' respective interests in their jointly titled house. The difficult question concerned Brewer's claim of an ownership interest in Blumenthal's medical practice.<sup>59</sup>

Few courts are willing to assume from the fact of cohabitation alone, even long-term cohabitation, a legally enforceable agreement to commingle the parties' financial affairs, even where they would assume, from the fact of marriage, just such an intent.<sup>60</sup> Indeed, the Illinois Supreme Court, for example, rejected Brewer's claim to a share in Blumenthal's medical partnership, even though the claim was based on the use of commingled funds. A California court is likely to reach the same conclusion, agreeing that: 1) the parties had no express agreement with respect to sharing the medical partnership; 2) they had no express agreement to treat assets purchased with funds from their joint account as jointly owned, and, therefore; 3) any

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56. *Id.* at 904 (Poche, J., dissenting).

57. Ellman, *supra* note 53, at 1367–69.

58. It remains far away from the Washington status-based “committed intimate union” approach, for example. Moreover, Brewer was unable to recover the funds she contributed to purchasing Blumenthal's medical practice. While the court explained that there had been no specific accounting of monies, it did not even give her the relief of a token restitutionary claim. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 73.

59. The court observed that while the action to partition the house was permissible, the “problem arose when Brewer counterclaimed for various common-law remedies, including sole title to the home as well as an interest in Blumenthal's ownership share in a medical group so that the couple's overall assets would be equalized now that the couple had ended their relationship.” *Id.* at ¶ 3.

60. Ellman, *supra* note 53, at 1372.

agreement to treat the partnership as jointly owned property would depend on implying an agreement from the “parties’ relationship, because the purchase was made for the family’s financial security,” something the courts in neither state are inclined to do.<sup>61</sup>

Nonetheless, the courts in many states have been willing to impose a constructive trust where the two parties contributed financially to the acquisition of property, and to sort through the parties’ respective contributions in that context.<sup>62</sup> In *Blumenthal*, however, the court emphasized “Brewer’s counterclaim does not provide a specific amount of funds she contributed to Blumenthal’s ownership interest in GSN.”<sup>63</sup> Even if that level of detail had been available, the court stated that the use of the funds

was an investment for the family, which included Blumenthal, Brewer, and their children. It was not an investment between business partners. Nor was it the kind of arm’s-length bargain envisioned by traditional contract principles. Rather, the arrangement to use the parties’ commingled funds was an arrangement of a fundamentally different kind, which . . . is

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61. *Blumenthal*, 2016 IL 118781, at ¶ 72. Compare *id.* (where the better off partner had owned part of a medical practice), with *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Ct. App. 1993) (where the better off partner had owned a legal practice).

If they were married, the analysis would be: first, were the funds used to purchase the partnership marital property or subject to distribution at divorce? If the funds came from the parties’ earnings over the course of a marriage, then they would ordinarily be treated as joint funds. See, e.g., *Miller v. Wilson*, No. 16-0587, 2017 WL 2608426, at \*4 (W. Va. June 16, 2017) (treating all property and earnings acquired by either spouse during a marriage as marital property). Second, does the jurisdiction treat the use of joint funds to purchase an asset titled in one parties’ name as a gift to that spouse? The states vary in their treatment of this issue, but most do not resolve the issue on the basis of title alone, allowing the spouse whose name is not on the title to claim a right to reimbursement based on the use of joint funds. Compare *McKay v. McKay*, 8 S.W.3d 525, 531 (Ark. 2000) (allowing the use of tracing to show that funds in a jointly entitled account came primarily from one spouse’s separate property and did not constitute a gift to the marital estate); *Jackson v. Jackson*, 765 S.W.2d 561, 561–62 (Ark. 1989) (where one spouse deposited separate property into a joint account, and then later used funds from the joint account to purchase property titled in her name alone, the use of property from the joint account did not make the property marital property), with *Knecht v. Palmer*, 252 So. 3d 842, 845 (Fla. Dist. Ct. App. 2018) (presuming that “[W]hen one spouse deposits funds into a joint account where they are commingled with other funds so as to become untraceable, a presumption is created that the spouse made a gift to the other spouse of an undivided one-half interest in the funds.”) (alteration supplied).

62. See, e.g., *Cates v. Swain*, 215 So. 3d 492, 494–95 (Miss. 2013) (upholding unjust enrichment claim based on monetary contributions to purchase of parties’ joint home, titled in the name of only one of the partners, while rejecting possibility of equitable claims based on the relationship itself).

63. *Blumenthal*, 2016 IL 118781 at ¶ 72.



intimately related and dependent on Brewer's marriage-like relationship with Blumenthal.<sup>64</sup>

In addition, where the parties commingle funds in a joint account, the courts generally start with a presumption of joint ownership, which can be rebutted if the parties can trace the source of funds.<sup>65</sup> But given that both parties have the right to withdraw funds and use them for individual as well as joint purposes, the mere fact that funds from a joint account were used to acquire an asset does not in itself establish joint ownership of the asset where it was titled in one parties' name alone.<sup>66</sup>

In the *Blumenthal* case, for example, Blumenthal, a doctor, earned more than Brewer, a lawyer who took time out of the paid labor market to care for the couple's children.<sup>67</sup> Thus, tracing would support Blumenthal's claim to the majority of the funds in the joint account. In addition, to the extent the couple used the account to pay joint expenses, these outflows would be attributed to Blumenthal and Brewer jointly, wiping out most or all of Brewer's contributions to the bank account.<sup>68</sup> Thus, tracing would help Brewer only if the court, first, assumed that all funds deposited into the account constituted a gift from the individual partners to a jointly owned enterprise, and then that use of the joint funds to purchase a separately owned medical partnership gave the partner without title a right to get back her share of the joint funds used for the purchase.

The crux of the case thus depended on treating the deposit of funds into a joint account as a gift, treatment that does not ordinarily occur simply from the titling of the bank account itself.<sup>69</sup> Instead, Brewer's claim depended on the court's willingness to infer an intent on Blumenthal's part to treat her deposits into the account as gifts on the basis of the nature of the parties' relationship—and that's what the court refused to do. While the Illinois Court rejected Brewer's claim on the basis of public policies favoring bright-line

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64. *Id.* at ¶ 71. Of course, the same thing was true of the parties' home. The difference in that case is that the parties held title to the property jointly.

65. Indeed, even within marriage, the courts have held that merely depositing funds in a joint account does not necessarily make the funds jointly owned. *See, e.g.,* Wu-Carter v. Carter, 179 A.3d 711, 720–21 (R.I. 2018) (concluding that wife's depositing of gift from her parents into a joint account did not transmute separate property into marital property).

66. *See generally* Leslie Joan Harris, *Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Distribution Law*, 83 OR. L. REV. 1291, 1314 (2004) (describing how tracing works to rebut a presumption of marital property).

67. *Blumenthal*, 2016 IL 118781, at ¶ 2.

68. Moreover, in many cases, the courts view the resources the lower-earning partners receives during the relationship as compensation for nonmonetary contributions. *See, e.g.,* Tompkins v. Jackson, No. 104745/2008, 2009 WL 513858, at \*1, \*13–14 (N.Y. Sup. Ct. Feb. 3, 2009).

69. *See* cases cited *supra* note 61.

distinctions between marital and nonmarital relationships; other courts, like the California court in *Friedman*, have done so because they have refused to imply enforceable commitments on the basis of the facts of the parties' relationship.<sup>70</sup> And outside of states that recognize a right of property distribution for unmarried cohabitants,<sup>71</sup> most courts have not been willing to recognize separately titled property as jointly owned simply because it was acquired over the course of a relationship in which parties otherwise pooled resources.<sup>72</sup> The courts have typically required either joint title or tracing of specific monetary contributions into the asset to provide relief.<sup>73</sup>

Going beyond what is available in Washington state, the American Law Institute's *Principles of Family Dissolution* (ALI *Principles*)<sup>74</sup> urges effectively making the same remedies available following the dissolution of a cohabitation as a marriage. These principles, however, had have not been

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70. The major exception has been Washington, which has been willing to recognize a community property regime in the context of a long-term committed relationship where the parties commingled their finances in a manner similar to the couple in *Blumenthal*. See *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000) (citing *Connell v. Francisco*, 898 P.2d 831, 831 (Wash. 1995)); see also *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992) (recognizing implied agreement to treat couples' joint assets as community property).

71. In addition to Washington and Nevada, which apply community property regimes to unmarried couples, two common law states, Alaska and Oregon, also recognize the ability to distribute property held over the course of unmarried relationship in accordance with the parties' presumed intent. See, e.g., *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012). In *Reed*, the Alaska Supreme Court ruled that a house held in one partner's name could nevertheless be treated as joint property where the parties "intended to acquire property as though married." *Id.* (In determining the parties' intent, the court looked at factors such as whether they: "(1) made joint financial arrangements such as joint savings or checking accounts, or jointly titled property; (2) filed joint tax returns; (3) held themselves out as husband and wife; (4) contributed to the payment of household expenses; (5) contributed to the improvement and maintenance of the disputed property; . . . (6) participated in a joint business venture; and (7) raised children together or incurred joint debts." (citing *Bishop v. Clark*, 54 P.3d 804, 811 (Alaska 2002))); see also *Tomal v. Anderson*, 426 P.3d 915, 923 (Alaska 2018) (concluding that simply living together is not sufficient to show the requisite intent, and that the parties are not necessarily presumed to share all property equally, but that the nature and conduct of the parties' relationship could be used to infer intent with respect to ownership).

Oregon also provides for a property division at the conclusion of a nonmarital relationship in accordance with the parties' intent and allows the courts to infer intent from the fact of cohabitation, an agreement to share incomes, and joint acts of a financial nature such as "a joint checking account, a joint savings account, or joint purchases." In the *Matter of Domestic P'ship of Joling*, 443 P.3d 724, 728 (Or. 2019); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978).

72. See *Nonmarriage*, *supra* note 8, at 61–69 (summarizing cases).

73. *Id.* at 69.

74. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6 (AM. LAW. INST. 2002).

fully adopted by any state,<sup>75</sup> although some Canadian provinces and other jurisdictions have established such rights.<sup>76</sup>

## II. A LEGAL TYPOLOGY OF UNMARRIED COUPLES

To determine the legal recognition appropriate for unmarried couples requires determining what the purpose of legal regulation is. We have argued elsewhere that the purpose of recognizing such relationships is autonomy; that is, support for the ability of intimate couples to enter into relationships on terms of their choosing without being forced into a one-size fits all version of marriage.<sup>77</sup> The concept of autonomy, by itself, however, cannot provide a comprehensive explanation because unmarried couples often do not agree on the terms that govern their relationships.<sup>78</sup> So the choice of default provisions, whether the provisions involve obligations similar to marriage, or no obligations at all, will necessarily favor some parties at the expense of others.<sup>79</sup> Instead, we used the concept of autonomy to suggest that legal regulations should parties promote two concepts. First, legal regulations should provide notice as to the nature of the obligations couples incur in

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75. *Nonmarriage*, *supra* note 8, at 66 n.53 (citing Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1280 (2015)) ("the ALI *Principles* have created controversy and that the provisions addressing the property distribution between unmarried partners have not been adopted by any state"); *see also Nonmarriage*, *supra* note 8, at 66 n.53 (citing Garrison, *supra* note 18, at 839–854) ("criticizing ALI *Principles* because of the failure to require consent to assumption of nonmarital obligations").

76. *See* Anna Stepień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 86–87 (2016); *see also* Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.), [http://www.qp.alberta.ca/1266.cfm?page=A04P5.cfm&leg\\_type=Acts&isbncIn=9780779780334](http://www.qp.alberta.ca/1266.cfm?page=A04P5.cfm&leg_type=Acts&isbncIn=9780779780334) [<https://perma.cc/N7FX-8PT3>]; Family Statutes Amendment Act, S.A. 2018, c 18 (Can.), [https://www.assembly.ab.ca/ISYS/LADDAR\\_files/docs/bills/bill/legislature\\_29/session\\_4/20180308\\_bill-028.pdf](https://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_4/20180308_bill-028.pdf) [<https://perma.cc/X4KU-FYN5>] (making numerous references to the Interdependent Relationships Act and substantially affects the rights of those who qualify as Adult Interdependent Partners); ALBERTA, FAMILY LAW CHANGES: BILL 28 UPDATES PROPERTY DIVISION LAWS TO INCLUDE UNMARRIED PARTNERS AND IMPROVE CHILD SUPPORT FOR ADULT CHILDREN WITH DISABILITIES <https://www.alberta.ca/family-law-changes.aspx> [<https://perma.cc/995Z-H65H>]; Laura Buckingham, *From Recommendation to Legislation: Bill 28 Implements ALRI's Recommendations About Property Division for Common-law Couples*, ABLAWG (Dec. 12, 2018), <https://ablawg.ca/2018/12/12/from-recommendation-to-legislation-bill-28-implements-alris-recommendations-about-property-division-for-common-law-couples/> [<https://perma.cc/XB4V-DW8B>].

77. *See Nonmarriage*, *supra* note 8, at 121.

78. *Id.*

79. *See, e.g.,* Stolzenberg, *supra* note 5, at 2030. Stolzenberg argues that "the problem is more fundamentally one of competing neoliberal principles: whether to respect the new family freedom by refusing to impose ex post family-based obligations on the richer party, or to privatize a poorer party's dependency by granting recovery despite ambiguity about family intent." *Id.* at 2019.

entering into a relationship,<sup>80</sup> and, second, the idea of notice should depend not just on formalities such as registration or contract, but on the extent to which default obligations correspond to community norm about responsibility for dependent partners.<sup>81</sup> These concepts of notice and consonance with community norms may include public policy concerns about protecting the vulnerable, but only to the extent they involve accepted community norms that put couples on notice of the obligations they are undertakings. Otherwise, the regulation of nonmarriage risks simply replicating marriage as the consequence of cohabitation. Considering the appropriate level of regulation therefore requires consideration of why couples who could marry choose not to do.

In the section below, we argue that such couples can be divided into four categories, who should be seen as having different obligations to each other. We arrive at these categories by looking at the characteristics of modern marriages. Marriage ordinarily involves a commitment to interdependent finances and the joint assumption of responsibilities. Married couples, for example, are substantially more likely than unmarried couples to have joint bank accounts and jointly titled property.<sup>82</sup> In addition, while marriage once involved intrinsically hierarchical relationships, today equal respect and decision-making power have become more important to the longevity of relationships.<sup>83</sup> And marriage continues to involve a long term commitment, one that couples are more likely to make to each other if they trust each other or share interests such as children.<sup>84</sup> Moreover, married couples are more

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80. Garrison, *supra* note 18, at 888.

81. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 328 (2015) (observing the relative harmony between spouses' preferences and the societal norms and legal default rules that form the common understandings about marital behavior and the difficulty of establishing similar support in the context of novel unmarried relationships).

82. See Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 411 (2010) (finding that married couples are more likely to pool income).

83. See Hara Estroff Marano, *Love and Power*, PSYCHOLOGY TODAY (Jan. 1, 2014), <https://www.psychologytoday.com/us/articles/201401/love-and-power> [<https://perma.cc/2F5P-WUD2>].

84. See, e.g., Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & Fam. Stud. 1, 12 (2007) (finding that low income women report reluctance to marry men they may have to "evict"); Michael S. Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment* 14 (RAND Lab. & Population Working Paper No. WR-1001, 2013), [https://www.rand.org/pubs/working\\_papers/WR1001.html](https://www.rand.org/pubs/working_papers/WR1001.html) [<https://perma.cc/YQJ2-R4A2>] (observing that "cohabitators are . . . substantially less certain about the permanence of their relationships than respondents in married relationships, and they report substantially lower levels

likely than unmarried couples to characterize their relationships in similar terms to each other. For example, cohabiting males are significantly less likely than cohabiting females to report that they “love . . . [their] partner a lot” or to view the relationship as a committed one, while there are no significant differences on these measures between male and female spouses.<sup>85</sup> In considering the different groups of unmarried couples, therefore, we use equality and commitment to identify four groups, focusing on why the groups choose to marry or not, and how these factors influence the arrangements they undertake during their relationships. And we conclude that with the acceptance of unmarried sexuality, three of the categories do not present a major cause for concern because the couples who are either committed or equal have the capacity to opt into voluntary arrangements if they choose. The fourth, however, involving unequal couples without a shared commitment to each other, raises the same concerns that once led society to treat all women as dependent and to deal with that dependence by shepherding intimate partners into marriage and keeping them there.

The four groups can be classified as follows:

First are the “equal and committed” relationships that involve commitment, producing financial interdependence, and equal respect, reflecting shared decision-making and mutual assumption of responsibilities. *Blumenthal v. Brewer*, at least at the point where the couple made commitments to each other, adopted their respective children and comingled their financial affairs, involved such a relationship. Such couples typically marry, but where they mutually choose not to, they have the capacity to provide for their own affairs. We suspect, for example, that if Blumenthal and Brewer had the choice of opting into a legal status equivalent to marriage, they would have done so, and in that case, they would have been subject to marital property provisions treating the assets produced over the course of the relationship as jointly owned. In the absence of such a formal legal status, almost all states recognize actions such as taking joint title to property or entering contracts with respect to the treatment of particular assets, such as a jointly run business, as enforceable, but differ about the enforceability of cohabitation agreements that simply replicate marriage, with some states willing to enforce them and states like Illinois treating them as void.

Second are the “equal and contingent” couples. Relationships in this group may involve equal respect and equal assumption of responsibilities, but do not involve commitment or interdependence. These relationships are more

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of ‘complete’ commitment to their partner, especially for males” while “married relationships of any duration consistently ranked higher on all of the intensity measures than cohabitations at even the longer durations”).

85. Pollard & Harris, *supra* note 84, at 12–13.

contingent, with the retention of greater individual independence within the relationship. The couples in this group may move in together as a matter of convenience, or they may view the cohabitation as a test of their long-term viability as a couple. While, overall, these couples tend to be younger than other groups, they also include older couples who may enter into relationships for companionship late in life. These couples typically keep their financial affairs separate. They are less likely than married couples to have joint bank accounts, jointly titled property, or long-term commitments to care for each other.<sup>86</sup> Young couples in this category typically have relatively few assets, while older couples may intentionally keep their assets separate, intending any inheritance to go to their children from earlier relationships.<sup>87</sup> Some of the couples in this group will eventually transition to more committed relationships; indeed, Blumenthal and Brewer almost certainly started out in this category at the beginning of their relationship. But research shows that couples in this category often make quite conscious decisions not to marry, and often express their reasons for not marrying in terms of their desire to make it easier to end the relationship.<sup>88</sup> These couples should not have obligations imposed on them to share property and provide support at the relationship's end.

Third, those couples who have a committed but economically unequal relationship. Within these relationships, the wealthier party has made a commitment at the outset of the relationship to provide for the other partner, even without marriage. Perhaps the most celebrated case involves Arthur Roccamonte, who promised to provide for Mary Sopko for the rest of her life

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86. See Addo & Sassler, *supra* note 82, at 411 (finding that married couples are more likely to pool income).

87. See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 17–18 (Cal. Ct. App. 1993), *modified*, (Jan. 22, 1993) (refusing to enforce oral promise in case where husband insisted on a premarital agreement and left the bulk of his estate to a daughter from a previous marriage). Cohabitation for older people can mean not being responsible for each other's debts and not losing government benefits dependent on their prior marriages. See Paula Span, *More Older Couples Are "Shacking Up,"* N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/08/health/older-americans-unmarried-couples.html> [<https://perma.cc/MS27-YWZX>].

88. See, e.g., SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION 12–14 (2017); Addo & Sassler, *supra* note 82, at 415 and accompanying text; Daniel T. Lichter et al., *Cohabitation, Post-Conception Unions, and the Rise in Nonmarital Fertility*, 47 SOC. SCI. RES. 134, 136 (2014); Amanda J. Miller et al., *The Specter of Divorce: Views From Working- and Middle-Class Cohabitors*, 60 FAM. REL. 602, 613 (2011) (observing that “[w]orking-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage.”); Sharon Sassler & Amanda J. Miller, *Class Differences in Cohabitation Processes*, 60 FAM. REL. 163, 172–174 (2011).

if she came to live with him.<sup>89</sup> Roccamonte died intestate, but the New Jersey Supreme Court held the promise, which Roccamonte had reiterated numerous times in the presence of others, to be enforceable.<sup>90</sup> Though the legislature subsequently changed the statute of frauds to require a writing for such promises to be enforceable in the future,<sup>91</sup> New Jersey would recognize such an express commitment if made in writing. In these relationships, the critical factor is the express agreement of the wealthier party to provide for the dependent party, and the state's criteria for what is necessary to recognize such an agreement, such as the requirement of a writing or a determination of the circumstances in which such an agreement to provide support beyond the termination of the relationship can be implied.<sup>92</sup>

Such express agreements, however, are rare.<sup>93</sup> The more controversial issue is whether such agreements can be implied, typically from the facts of the relationship itself. At the time of dissolution, however, the parties typically dispute the existence of an agreement, leading to the fourth category.

The fourth group, which generates the bulk of the controversy, are those relationships characterized by dependence, but neither unequivocal commitment nor equal status. In these cases, one partner may be better off than the other, and the second partner may, either from the beginning of the relationship or over the course of time, have come to depend on the wealthier partner's superior resources. Often in these cases, the decision not to marry is a unilateral rather than a mutual one, with the economically superior party refusing to marry or to enter into a formal agreement in circumstances in which the economically weaker party would prefer such a commitment. In addition, the parties often report different understandings about their relationship at the time of dissolution. In *Marvin*, for example, Triola alleged that Marvin promised to "provide for all of plaintiff's financial support and needs for the rest of her life," a promise that would make the relationship a committed one, equivalent to *Roccamonte*.<sup>94</sup> Triola, however, was never able

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89. We treat this case as "committed" because Roccamonte made an express promise to provide for her "for the rest of her life" without conditioning the promise on the continuation of the relationship. See *In re Estate of Roccamonte*, 808 A.2d 838, 846–48 (N.J. 2002).

90. *Id.*

91. See *Maeker v. Ross*, 99 A.3d 795, 797 (N.J. 2014) (holding N.J. REV. STAT. § 25:1–5(h) (2018) (the statute of frauds) to apply prospectively only).

92. Marvin noted: "courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture." *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976); see also *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978) (inferring agreement to share assets on the basis of the parties' relationship).

93. Ellman, *supra* note 53, at 1367 n.17.

94. *Marvin v. Marvin*, 557 P.2d 106, 110 (1976).

to prove that Marvin has made such a promise and Marvin almost certainly viewed his refusal to marry as a refusal to make such a long-term commitment, either emotional or financial, to Triola.<sup>95</sup> These relationships are unequal and “contingent,” in the sense that the higher earning party, by not marrying and by not entering into an express agreement, has reserved the right to unilaterally terminate the relationship without any long term obligation to the dependent partner. The question with which courts struggle is whether the parties owe each other anything when the relationship ends and, in particular, what the parties should owe each because of the nature of the relationship itself.

Consider a comparison of courts’ approaches to two different cases. In one, the couple chose to live together when plaintiff-respondent was twenty-five years old.<sup>96</sup> The parties agreed to live together as though they were married; “they vowed to be husband and wife and to strive to be partners in all respects ‘without any sanction by the State.’”<sup>97</sup> Over the twenty years, they moved from California to Alaska and back.<sup>98</sup> One had a child before they began the relationship, but they also had children of their own during the relationship.<sup>99</sup> One of the parties completed law school and went into practice; the other took care of the children, delayed returning to school because of a sick child, and had a herniated disk that made it difficult to study or work.<sup>100</sup> The parties also planned a wedding ceremony, but when the higher earning partner could not travel because of bad weather, the ceremony was called off and never rescheduled.<sup>101</sup> When they ended the relationship, they owned several properties titled in both their names, which they divided, and the wealthier party was ordered to pay child support in a separate proceeding.<sup>102</sup> The question the California court had to address was whether grounds existed to order the wealthier party to pay support.<sup>103</sup> The court concluded no, relying in large part on the wealthier party’s testimony that the pair had never discussed what would happen if the relationship ended, and hence that there was no enforceable promise or commitment.<sup>104</sup> The

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95. See *Marvin v. Marvin*, 122 Cal. App. 3d 871, 873–74, 176 Cal. Rptr. 555, 557 (Ct. App. 1981) (holding that Marvin “never had any obligation to pay plaintiff a reasonable sum as and for her maintenance.”).

96. *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 894 (Cal. Ct. App. 1993).

97. See *id.* 894–895.

98. *Id.* at 895.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 895, 904 n.1.

103. See *id.* at 896.

104. See *id.* at 898–899.



lower-earning partner in this case had, however, become dependent on the other over the course of the relationship, at least in part because of the responsibilities assumed over the course of the relationship.<sup>105</sup>

Consider now an alternative case in Hawai'i.<sup>106</sup> Again, in this case, the parties entered into a relationship when they were young, both in business, and in relatively equal circumstances.<sup>107</sup> They were engaged to marry.<sup>108</sup> One of the parties (Simmons), however, suffered a reversal in business fortunes and the other (Samulewicz) called off the wedding for fear of being exposed to potential liability.<sup>109</sup> They nonetheless had a spiritual ceremony, lived together, and one of the partners managed property titled in the other's name.<sup>110</sup> When the relationship ended after seven years, the less successful party wanted a share of the property. The Hawai'i Supreme Court dismissed the contract and implied contract claims, emphasizing that "[c]ohabitation, no matter for how long, does not by itself prove the existence of a contract implied-in-fact."<sup>111</sup> The court nonetheless allowed an unjust enrichment claim to move forward that provided an opportunity to recover the \$46,000 in mortgage payments and the tens of thousands of dollars in other sums Simmons had invested in properties held solely in Samulewicz's name.<sup>112</sup> In this case, the lower earning party had become dependent over the course of the relationship, but not necessarily because of the relationship itself.<sup>113</sup> The court distinguished between expenses "related to maintaining their household and which 'tend to [the] mutual comfort and convenience of the family'" such as upkeep of a car and of their common house and those transfers that went "beyond the scope of 'services' for the 'mutual comfort and convenience of the family.'"<sup>114</sup>

In both of these cases, the parties may have had different notions of what their decision to live together without marrying meant.<sup>115</sup> In both cases, the parties agreed to treat their relationships as "marriage-like," but without either the

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105. See *id.* at 895 (describing how the lower-earning partner did not return to school as planned, in part, because of the birth of a second child with health problems).

106. *Simmons v. Samulewicz*, 304 P.3d 648 (Haw. Ct. App. 2013).

107. *Id.* at 654.

108. *Id.* at 657.

109. *Id.* at 651.

110. *Id.*

111. *Id.* at 656 (quoting *Aehagma v. Aehagma*, 797 P.2d 74, 79 (Haw. Ct. App. 1990)).

112. *Id.* at 656, 658–59.

113. *Id.* at 657–58.

114. *Id.* at 657–58 (alteration in original).

115. See, e.g., Michael S. Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment* 12–13 (RAND Labor & Population, Working Paper No. WR1001, 2013), <http://ssrn.com/abstract=2284457> [<https://perma.cc/56Q3-376S>] (indicating that cohabiting males reported lower levels cohabiting females). )

legal commitment to each other of a marriage or agreement on what would take place if the relationship ended. In the *Friedman* case, however, one party became dependent because of the arrangements during the relationship: she moved to another state, did not complete college as she had planned, took care of the children, worked on their joint properties, and suffered an injury that prevented her working and interfered with her planned return to school. In the *Simmons* case, in contrast, Simmons's financial reverses did not occur because of the relationship, and his management of the rental property did not prevent him from assuming other employment. Nonetheless, Simmons supported Samulewicz's business travel and career development just as Friedman supported her partner's acquisition of a law degree. And Simmons made substantial contributions to the property held solely in Samulewicz's name (with the parties transferring title solely to Samulewicz to protect it from Simmons's creditors).<sup>116</sup>

This group of relationships is characterized by inequality and a decision, often a unilateral one, by the dominant partner not to assume responsibility for the dependent one. These relationships may nonetheless involve an exchange of the dominant partner's resources for the other partners' contributions to homemaking, childrearing or business assistance over the course of the relationship. When they end, they may leave the dependent partner feeling betrayed. These relationships are often seen in gendered terms, including the prototypical "woman as deserving and dependent victim." Indeed, the type of financial dependence at the core of these relationships has historically been a major reason for insisting on marriage as the necessary institution to protect the dependent, the unequal and the vulnerable, particularly when women were the intrinsically weaker party given the risk of pregnancy, limitations on property ownership, and lack of protection against discrimination. And today a principal argument for not just enforcing express agreements, like the one in *Roccamonte*, but implied agreements in cases like *Friedman*, is to ensure that women's domestic contributions receive recognition and protection.<sup>117</sup> Yet, as *Simmons* shows, the nature of the exchange within intimate relationships can take a variety of forms. To date, the line the law draws tends to be between express agreements, which may be enforceable, and implied-in-law ones, which are not, and between monetary contributions to an asset such as rental property versus contributions to the home or the relationship itself.<sup>118</sup> It is possible to

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116. *Id.* at 651 (noting that Simmons said he transferred his interest in the property to Samulewicz, in part, to protect the property "from potential creditors of his business").

117. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2148–49 (2019) (arguing that domestic contributions ought to be recognized and valued).

118. *Id.* at 2139–40.

imagine more expanded obligations that would presumably apply to both *Friedman* and *Simmons*, yet the differences between the two cases create a conundrum.

First, the argument for protection of the dependent partner in a case like *Friedman* is the same argument that has historically been made for channeling couples into marriage: the intrinsic inequality that arises from childrearing or from one party's disproportionate assumption of domestic responsibilities that benefit both. Now that marriage has become an institution premised on formal equality, those who choose not to marry often do so, like Mr. Friedman and Ms. Samulewicz, precisely because at least one of them does not want the obligations marriage entails. Imposing obligations on them requires a public policy determination that protection of a lower-income partner is an important public policy objective for a nonmarital relationship. Inside of marriage, of course, family law presumes that the parties have agreed to create an interdependent economic union, but even that presumption comes from the treatment of marriage as an agreement to long-term commitment and commingling of the parties' financial affairs rather than because of the presumption that marriage is uniquely designed to protect the dependent.<sup>119</sup> Outside of marriage, there is no such presumption, and in fact nonmarital couples differ systematically from marital couples in their willingness to commingle their finances.<sup>120</sup> Taking the position that dependent nonmarital relationships require the imposition of default rules to protect the vulnerable thus requires taking the position that at least certain types of relationships involve what marriage once did—the imposition of a societally mandated obligation to provide for the intrinsic vulnerabilities associated with at least certain types of intimate relationships.

Second, cases like *Friedman* and *Simmons* exist on a continuum that defies easy categorization of the normative basis for implied contract terms. Many proposals would tie default, status-based terms for nonmarital relationships to the length of the relationship, differences in income and commingling of the couples' assets—criteria that would produce similar results in *Friedman* and *Simmons*. Yet, there is a fundamental difference between the two cases: Friedman's dependence arises in large part because of the decisions made over the course of the relationship while Simmons's dependence occurs to a greater degree because the financial reverses that occurred independently of the couples' arrangements. Indeed, while Simmons contributed to properties held in his partner's name, we have no information as to which partner handled the majority of the couples' domestic responsibilities. It is possible

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119. See *Nonmarriage*, *supra* note 8, at 84–85.

120. *Blumenthal v. Brewer*, 2014 IL App (1st) 132250, at ¶ 6.

that Samulewicz both earned more *and* did more at home. The normative foundation of the two cases is thus arguably different, but making a fact specific distinction between the two cases would be challenging.<sup>121</sup> Elliott Friedman, after all, could maintain that Terri Friedman's real problem was her back injury, which disrupted a mutual agreement that they would take turns going back to school, and Simmons could argue that his assumption of domestic responsibilities allowed Samulecisz to undertake the travel that advanced her career and led to a job in Europe.

Professor Antognini alleges that, in cases like *Simmons*, "[t]he courts' concern . . . becomes whether the man seeking property failed in his traditional role of breadwinner,"<sup>122</sup> that is, the courts impose gendered expectations in its assessment of the parties' respective contributions to the relationship. The existing cases, however, arguably involve the opposite: Scott Simmons is treated like Eileen Brewer and Terri Friedman with respect to compensation for household services. The real gender disparity comes from the fact that courts recognize his claim for unjust enrichment, with men more likely than women to make the type of monetary contributions that rise to the level of Simmons's restitution claim.<sup>123</sup>

Third, the differences between the two cases also involve differences in community norms that reflect the intersection of race, class, and gender. *Friedman* describes a typical middle-class case in that the man's income is higher and more stable than the woman's, with decisions over the course of the relationship increasing the disparities between them. While the couple in *Simmons* appear to be similarly well off, their concerns are more typical of working-class relationships, where one party is reluctant to take on the debts of another.

Unlike the couples in *Marvin* or *Friedman*, working-class parties (including many women) are reluctant to commit to a marriage-like relationship because of concerns about a partner's income stability, expenses, and debts. A study of cohabitants in their twenties indicated that among those with some college, more of the women than the men expected to marry their current partners;<sup>124</sup> other studies indicate that better-off young men are more

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121. For example, in *Friedman*, Terri's back problems may or may not be independent of the relationship, and her physical injury prevented her from returning to school. In *Simmons*, the court emphasized Simmons' contributions to the rental property, but we do not know whether he did so in ways that precluded other employment opportunities.

122. Antognini, *supra* note 20, at 1935.

123. *See id.*

124. "Among cohabitants in their twenties who have completed at least some college, for example, 68 percent of women but only 46 percent of the men expect to marry their current partner. Better-educated men are more likely to report concerns about relationships limiting their future

likely than women to see their current partner as holding them back.<sup>125</sup> Among couples with less education, however, the men were more likely than the women to say that they expected to marry their current partners. And other studies of this group indicate that the women see instability in the men's contributions to the relationship as a potential threat—a commitment to see the men through bad times often comes at the expense of resources women see as necessary to their or their children's well-being.<sup>126</sup> Both types of concerns lead to decisions to cohabit rather than marry, and both types of cohabitation may change over time, breaking up or becoming more committed or more dependent as circumstances change. The Fragile Families study, for example, found that only about one-third of couples who were cohabiting at the birth of their child were still together five years later,<sup>127</sup> despite the fact that other studies have shown that the majority of cohabitants stated that they intended to marry.<sup>128</sup> One major reason that the relationships of younger cohabitants end is because of the role of domestic violence—violence often associated with the pregnancy itself.<sup>129</sup>

Expectations concerning the future of the relationships diverge based on class and gender. While cohabitation precedes most marriages,<sup>130</sup> cohabitants differ in their expectations about marriage. Low income women are concerned about a commitment to a man who is financially unreliable; such a commitment can threaten the resources on which they rely for supporting

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opportunities, and to fear that a commitment to their current partner may hold them back. These men (and some women) may separate their current interest in sex from what they see as true romantic love or the kind of unconditional commitment they hope to extend to someone else in the future.” June Carbone & Naomi Cahn, *Family Law & Emotion*, in THE EDWARD ELGAR RESEARCH HANDBOOK ON LAW AND EMOTIONS (Susan Bandes et al. eds., forthcoming 2020); see also KAY HYMOWITZ ET AL., KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 28 (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf> [<https://perma.cc/9QHC-7745>].

125. MARK REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA: HOW YOUNG AMERICANS MEET, MATE, AND THINK ABOUT MARRYING* 210 (2011).

126. *Nonmarriage*, *supra* note 8, at 96–97.

127. *Fragile Families and Child Wellbeing Study: Fact Sheet*, PRINCETON U. 1, [https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/ff\\_fact\\_sheet.pdf](https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/ff_fact_sheet.pdf) [<https://perma.cc/5NQ3-KWRA>].

128. Maureen R. Waller & Sara S. McLanahan, “His” and “Her” Marriage Expectations: Determinants and Consequences, 67 J. MARRIAGE & FAM. 53, 56 (2005) (finding that in most couples, both partners expect to marry, and their shared expectations are the strongest predictor of marriage and separation following their child's birth).

129. Jennifer Barber et al., *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175, 196 (2017).

130. Colleen N. Nugent & Jill Daugherty, *A Demographic, Attitudinal, and Behavioral Profile of Cohabiting Adults in the United States, 2011–2015*, 111 NAT'L HEALTH STAT. REP. 1 (2018), <https://www.cdc.gov/nchs/data/nhsr/nhsr111.pdf> [<https://perma.cc/8SMA-E6HS>].

themselves and their children.<sup>131</sup> For cohabitants between the ages of eighteen and twenty-nine who are not high school graduates, less than half of the women (47%)—but two-thirds (67%) of the men—state that they expect to marry their current partners.<sup>132</sup> Better-educated young men, by contrast, are more likely to report concerns about relationships holding them back,<sup>133</sup> and among cohabitants with at least some college, it is the women who are more likely than the men to report that they expect to marry their current partner (68% of women, 46% of men).<sup>134</sup>

In different communities, the normative and practical contexts in which nonmarital relationships occur, both in terms of individual perceptions of obligation and community norms, are not uniform. These factors suggest that designing default terms to govern nonmarital relationships will be challenging if not impossible. We argue below that the result should be a distinction between supplying legal regulation versus imposing governance, and between facilitating voluntary agreements versus supplying broad based and legally binding default terms.

### III. OPTIONS

The four categories above demonstrate how nonmarital relationships do not rest on a single set of assumptions, and, indeed, we recognize that nonmarital relationships change over time, defying easy categorization.<sup>135</sup> Moreover, all the evidence suggests that unmarried couples are less likely than married ones to agree on the nature of their relationship. In addition, women remain more likely to stay in the labor market in the context of a contingent relationship than in a committed one and working-class women feel freer to refuse to do a disproportionate share of nonmarket labor in cohabiting relationships.<sup>136</sup>

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131. Bowman, *supra* note 84, at 11.

132. HYMOWITZ ET AL., *supra* note 124, at 28; *see also* Miller *supra* note 88, at 602, 613 (observing that “[w]orking-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage”).

133. *See, e.g.,* REGNERUS & UECKER, *supra* note 125, at 192 (reporting that ambitious men want sex as recreation but are wary about the limitations of more committed relationships).

134. HYMOWITZ ET AL., *supra* note 124, at 28.

135. *See* Cynthia Grant Bowman, *Living Apart Together as a “Family Form” Among Persons of Retirement Age: The Appropriate Family Law Response*, 52 FAM. L.Q. 1, 2–4 (2018). The article discusses nonmarital couples who, although they are not cohabitants, are committed couples with equal respect and equal assumption of responsibilities, but not financial interdependence.

136. *See* Suzanne Bianchi et al., *Gender and Time Allocation of Cohabiting and Married Woman and Men in France, Italy, and the United States*, 31 DEMOGRAPHIC RES. 183, 186 (2014),

Doing justice to these relationships accordingly requires embracing couples' autonomy and intent in creating nonmarital relationships<sup>137</sup> and giving them more tools for crafting and ratifying express agreements, particularly with respect to financial matters. The proposals recognize that, particularly at the end of a relationship, the couple may differ substantially from each other (and from their starting assumptions about their relationships). Therefore, the legal specification of default terms can help shape expectations about nonmarital obligations.

### A. Proposals

Moving forward, there are a number of different means for recognizing the differing types of relationships. A notable aspect of *Brewer* was the court's plea for legislative direction, a plea that is being answered by the ULC's new Drafting Committee on the Rights of Unmarried Cohabitants.

The proposals can be seen along a continuum. At one end is status; similar to the ALI proposal or the legislation in the Canadian province of Alberta, couples become domestic partners by living together for a set period and sharing a life.<sup>138</sup> At the other end is a *Marvin*-type approach, recognizing contract and unjust enrichment. Along the continuum are opt-in arrangements, such as the French PACS<sup>139</sup> or the Colorado designated beneficiary status.<sup>140</sup>

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<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4231537/> [https://perma.cc/DRC9-XTYA]. The difference in nonmarket work patterns is limited based on controlling for age and educational attainment, but that is not surprising, given that cohabiters are typically younger than married couples.

137. Kaiponanea Matsumura, *A Right Not To Marry*, 84 FORDHAM L. REV. 1509, 1541–44 (2016).

138. The details on length of time and the criteria for an interdependent relationship vary, depending on the scheme. *See, e.g.*, Catherine Brown & Kyle T. Gardiner, *The Rights of Unmarried Cohabitants in Canada*, 24 TRUSTS & TRUSTEES 86, 89–90 (2018) (discussing Alberta Act, prior to its 2018 amendment); *Summarizing ALI Principles*, *supra* note 18, at 305–06; *Family Law Changes*, GOV'T OF ALBERTA (2019), <https://www.alberta.ca/family-law-changes.aspx#toc> [https://perma.cc/9AXW-RC9S].

139. *See* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 632–43 (2013); Ji Hyun Kim, Scott A. Oliver & Margaret Ryznar, *The Rise of PACS: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69, 83–88 (2017).

140. *See* John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 386–87 (2015).

### 1. Establish the Legal Status of Nonmarriage

Recognition of nonmarriage as its own legal status means starting from an examination of what nonmarriage is, rather than what it is not. True recognition of nonmarriage should make it easier for parties to select and enforce the terms of the relationship of their choice. This means courts should not only enforce formal contracts, when they exist, but also ensure enforcement when partners opt into other forms of legal recognition of their relationships.<sup>141</sup>

In the absence of such formalities, the law should apply presumptions that recognize that nonmarital relationships exist on a continuum but start from a different basis from marriage. In accordance with this principle, the courts should presume that the parties expect to remain financially independent, they expect to receive credit for contributions to the acquisition of major financial assets such as a house (or medical practice), and they do not anticipate tallying up contributions for routine day-to-day expenses such as groceries in the absence of an express agreement and record keeping that would make such an accounting fair and practical. Financial professionals should assist. The purchase of a home or a car or the opening of a bank account is a formal event, with opportunities to think about how to take title and to establish a record that reflects the parties' respective contributions. In contrast, there should be no expectation of financial obligations arising from informal day-to-day exchanges.<sup>142</sup>

### 2. Domestic Partnership Registries

Jurisdictions could establish domestic partnership registries (similar to Colorado's designated beneficiary status) that not only allow parties to register their unions, but also allow them to select from a menu of options to govern the terms of their relationships. These form agreements could include items such as health care decision-making power, the treatment of bank accounts and liability for expenses, provisions for support, etc. They could be designed to require both parties' consent to create the union and unilateral withdrawal with notice to the other party.<sup>143</sup>

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141 Twenty-six percent of lawyers in the American Association of Matrimonial Law report increased interest in cohabitation agreements. Joslin Davis, *Avoiding a Costly Cohabitation Divorce*, HUFFINGTON POST (June 2, 2016), [http://www.huffingtonpost.com/joslin-davis/avoiding-a-costly-cohabit\\_b\\_10261306.html](http://www.huffingtonpost.com/joslin-davis/avoiding-a-costly-cohabit_b_10261306.html) [<https://perma.cc/55CM-SLX9>].

142. See *Nonmarriage*, *supra* note 8, at 112.

143. See Culhane, *supra* note 140, at 386–87.



### 3. PACS

The French PACS (Pacte Civil de Solidarité) provides an alternative model, and it is even more flexible than civil unions or domestic partnerships.<sup>144</sup>

To enter into a PACS, the couple must sign an agreement, using either a standard form or a more individualized agreement.<sup>145</sup> The substance of the agreement is that the parties agree to live together as a couple and share household expenses and ordinary debts incurred during the cohabitation. As is true with getting married, the partners are entitled to take leave from work when entering into a PACS. There are no inheritance rights, although the surviving partner does have some protections (such as housing and taxes if any assets are inherited). The PACS can be dissolved by either party by registering the request for dissolution. The pact must be registered with the civil registry, although the couple can appear before a notary, who will then undertake the registration. The requirements are: 1) PACS agreement (personalized agreement or official form); 2) joint declaration of a civil solidarity pact (PACS); 3) birth certificates; and 4) valid identity documents.<sup>146</sup>

A PACS allows for certainty for nonmarital partners so that they can choose whether to create rights *inter se*, and it also serves a channeling function, providing a simple and efficient mechanism for courts to determine legal rights.

Of course, if applied in the United States, this option raises enactability issues, as some states have abolished the status of civil union or domestic partnership following the Supreme Court's *Obergefell* decision, and no state has followed the leads of Hawaii and Colorado in creating reciprocal beneficiaries or designated beneficiaries.<sup>147</sup>

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144. See, e.g., Directorate of Legal and Administrative Information, *Civil Solidarity Pact (Pacs)*, SERVICE-PUBLIC.FR, <https://www.service-public.fr/particuliers/vosdroits/N144> [<https://perma.cc/RGA3-A8ZA>]; *Civil Partnerships (Pacs)*, NOTAIRES DE FR. (Nov. 1, 2017), <https://www.notaires.fr/en/couple-family/civil-partnership-pacs> [<https://perma.cc/YFV6-LYW6>]; *Marriage and PACS (Civil Partnerships) in France*, U.S. EMBASSY & CONSULATES IN FR. (June 2019), <https://fr.usembassy.gov/wp-content/uploads/sites/50/Marriage-in-France-Oct-2019.pdf> [<https://perma.cc/6XTV-8GZJ>].

145. Directorate of Legal and Administrative Information, *To Pacser*, SERVICE-PUBLIC.FR (Sept. 12, 2019), <https://www.service-public.fr/particuliers/vosdroits/F1618> [<https://perma.cc/5W7U-MHGW>] ("Future partners must write and sign an agreement . . . [and] [i]t must at least obligatorily mention the reference to the law instituting the PACS: 'We, X and Y, conclude a civil solidarity pact governed by the provisions of . . . the civil code.' The convention can be more complete and specify the conditions of participation of each one in the common life . . .") (translated).

146. *Id.*

147. See Culhane, *supra* note 140, at 383, 385–86.

Finally, there are a distinct set of issues to consider during these relationships, apart from those at the end. The law could facilitate caretaking without recognizing emotional commitment by, for example, allowing for hospital privileges.<sup>148</sup>

### *B. Objections*

Proposals to recognize default rules for unmarried couples that treat the couples as financially independent, rather than impose marital-type obligation that presume financial interdependence, are controversial.

#### 1. Care of Those Who Become Dependent over the Course of Relationship

The failure to impose marriage-like obligations effectively means that a higher-earning party has no continuing obligations to the lower-earning party, even when their disparities in earning power occurred over the course of their relationships. Such assumptions—for example, one that unmarried couples intend no benefits for the lower-earning party absent an express agreement—risk benefitting the stronger (typically male) party at the expense of a weaker and dependent party (typically the female)<sup>149</sup> in circumstances in which the parties are unlikely to have equal bargaining power. Indeed, courts and scholars have recognized that the failure to intervene favors the financially better-off party and argued that this is an important concern to address.

The problem is that a paradigm that presumes a stronger and weaker party and a consequent obligation to protect the weaker party imposes uniformity on a set of diverse relationships—and assumes what has historically been a gendered pattern of dependence.<sup>150</sup> But this presumption does not reflect the reality of contemporary nonmarital relationships. Not all cohabiting parties involve rich men living with (and taking advantage of) dependent women, and it is a mistake to base the law of nonmarriage on a one-size fits all view of cohabiting relationships. As women's economic opportunities have

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148. See Bowman, *supra* note 84, at 48.

149. "For in using choice-based arguments to resist assignment of resources to poorer family members, richer parties rely upon neoliberal premises, in particular that freedom consists in strong property entitlements and that property transfers are illegitimate absent title holders' consent." Stolzenberg, *supra* note 5, at 1989.

150. Of course, men can be dependent on their partners, and women can be dependent on female partners. But the historical legacy of Blackstonian marriage presumes female dependence on a male partner as a justification for the imposition of marriage-like obligations. As we have suggested, however, in the comparison of *Friedman* and *Simmons*, the patterns that give rise to dependence vary from case to case and may reflect a variety of gendered patterns.

increased, the courts have recognized the growing variety of circumstances that underlie cohabitation and have refused to intervene, even if that refusal strengthens the position of the financially dominant partner. To the extent that dependence per se is protected, it should be tied to the existence of dependence arising from the assumption of joint responsibilities such as children, as in the Hewitt family.

## 2. Using Exceptional Cases

Professor Antognini argues that the cases that dominated nonmarital decision-making have been exceptional ones involving same-sex partners or reverse gender different sex paradigms such as that in *Simmons*. And she is certainly right in a sense; women are more likely than men to be in a dependent position because of what happened during the relationship and to sue to vindicate feelings of betrayal like those in *Hewitt*, *Friedman*, *Marvin*, and *Blumenthal*. Yet, the typical case of cohabitation in the United States is not one between a doctor and a lawyer (*Blumenthal*), a movie star and a starlet (*Marvin*), or even a Berkeley lawyer and a homemaker who lived together in the Alaskan wilderness (*Friedman*). Instead, nonmarital cohabitation tends to correspond with class.

Young, well-educated couples have become increasingly likely to live together outside of marriage, but they tend to bear children overwhelmingly in committed relationships that typically involve marriage. Less educated couples are less likely to marry before giving birth, and they often reverse the typical gender presumptions, with women expressing greater reluctance to marry than men. The better off a different sex couple is, the more likely the man earns more,<sup>151</sup> the poorer the couples, the more likely it is that the woman earns more, and Miller and Sassler report that women who are the primary wage-earners in a relationship are more reluctant than other women to marry.<sup>152</sup>

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151. Jill E. Yavorsky et al., *Women in the One Percent: Gender Dynamics in Top Income Positions*, 84 AM. SOC. REV. 54, 74–75 (2019); Andrew Van Dam, *Among 1-Percent Earners, Where Are all the Women?*, WASH. POST (Feb. 18, 2019, 8:20 AM), [https://www.washingtonpost.com/us-policy/2019/02/13/glass-ceiling-is-even-higher-penthouse-women-percenters-are-rare/?utm\\_term=.02c88d030530](https://www.washingtonpost.com/us-policy/2019/02/13/glass-ceiling-is-even-higher-penthouse-women-percenters-are-rare/?utm_term=.02c88d030530) [<https://perma.cc/PD87-KS4M>].

152. Amanda Jayne Miller & Sharon Sassler, *The Construction of Gender Among Working-Class Cohabiting Couples*, 35 QUALITATIVE SOC. 427, 443 (2012) (indicating that women who were the primary wage-earners were more reluctant to marry); see also Bowman, *supra* note 84, at 12 (finding that low income women report reluctance to marry men they may have to “evict”). Of course, wealthy women may well act the same way, refusing to marry a long-term cohabitant who poses a threat to their financial well-being.

The couples who have become more likely to marry—and more likely to stay together—are those who see themselves as contributing equally to a relationship—or are blinded by love. Overall, marriage has become far more based on “assortative mating” with the couples who wed marrying people much like themselves<sup>153</sup> once they have achieved a certain economic standard of living.<sup>154</sup> Financial equality and higher earnings are associated with cohabitation leading to marriage and with relationship stability, regardless of marriage.<sup>155</sup>

We view the four groups as distinct and yet difficult to distinguish in practice because the couples may change from relatively equal and uncommitted at the beginning of the relationship to less equal, but more interdependent over the course of the relationship. The most unjust cases are those like *Blumenthal*, where the parties exchanged promise to live together “like a married couple” and one of the parties later breached that promise by ending the relationship and taking the majority of the resources that the couple produced jointly.<sup>156</sup> Yet the answer is not to use the exceptional case to establish law for all categories of nonmarital couples.

### 3. Elevating Marriage

To be sure, such a system, which draws a bright-line rule based on marriage, may appear to fall into the trap of promoting and celebrating marriage at the expense of other forms of intimate relationship. Because it distinguishes rights based on marriage from those in other relationships, it allegedly privileges marital status and deprives others.

Yet that formulation gets it backwards. Instead of imposing a one-size-fits-all-with-opt-out on couples, as marriage does, this system recognizes that nonmarriage comes in different sizes and shapes. It tries to honor the reasons

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153. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 62 (2014); Stéphane Mechoulam, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 165 (2006) (finding that greater assortative mating contributes to a reduction in divorce rates); Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage from 1940 to 2003*, 43 DEMOGRAPHY 621, 641–42 (2005) (observing that assortative mating has increased over time).

154. “Adjusting for couples’ absolute earnings, increases in wealth and couples’ earnings relative to” the economic standard associated with marriage is a strong predictor of marriage. Patrick Ishizuka, *The Economic Foundations of Cohabiting Couples’ Union Transitions*, 55 DEMOGRAPHY 535, 535 (2018).

155. *Id.* at 550.

156. *Blumenthal v. Brewer*, 2016 IL 118781, at ¶ 60.

that couples might choose marriage or a nonmarriage arrangement.<sup>157</sup> The institution of “marriage has become a distinct—rather than universal—bargain.”<sup>158</sup> While marriage presumes a joint assumption of responsibility, nonmarriage is different. In marriage, “for richer, for poorer” is a literal statement of the obligations, and the law protects the investment that both partners make during the relationship itself and in their children. As a result, marriage is riskier in some ways because whatever property is earned during the marriage is subject to division, and whatever changes in workforce participation based on the marriage may not be compensated at divorce. Consequently, the spouses must take care in choosing their partner. Recognizing nonmarriage as a legitimate system on its own terms requires acknowledging the potentially differing understandings and expectations of the partners as well as the diverging populations that choose marriage. As marriage increasingly becomes the province of the elite, *Simmons v. Samulewicz* reminds us of the position of many women, especially the working class women unlikely to be the subject of precedent-setting judicial opinions, who are wary to assume the debts of their male partners.

#### 4. Judicial Discretion

An additional concern about increasing the legal obligations that arise from cohabitation is the difficulty of determining who should get benefits. The ALI attempted to construct bright line rules that arose from the length of the cohabitation and that assumed that the parties’ lives became increasingly intermingled over time. Yet, the major objection to the Principles concerned the lack of notice to a couple that, just by moving in together, they might incur such obligations.<sup>159</sup> An approach that allowed greater attention to the facts of particular cases, however, would dramatically increase uncertainty. Courts could reasonably differ, for example, on the facts of *Blumenthal v. Brewer* in deciding whether Brewer had been adequately compensated for her domestic contributions by her share of the property that the couple had held in joint title or by the support she had received during the relationship or from the contributions Blumenthal had made to her career as a lawyer. Allowing fact specific determinations in such cases could increase litigation costs and the complexity of these determinations.

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157. See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1285 (2014) (discussing “the potential financial benefits of nonrecognition”); Matsumura, *supra* note 137, at 1515 (explaining that people may not marry because of “legal consequences and personal beliefs”).

158. *Nonmarriage*, *supra* note 8, at 117.

159. See *Summarizing ALI Principles*, *supra* note 18, at 315–18.

## IV. CONCLUSION

While the default norm of marriage is the presumption of joint contributions, the default norm for nonmarriage could be established as a presumption of independence and separate finances. That is, marriage is a fixed institution premised on equality with a set of clear rules, while nonmarriage implies the freedom from set rules. For each, the law should facilitate options to craft arrangements on a continuum of terms.

The ability to recognize nonmarriage as its own status has required the jettisoning of the once unshakeable conviction that all intimate relationships were intrinsically unequal, only men were in a position to be able to support a family, and any man capable of support who deserted his partner or their children (inside or outside of marriage) was a heel, and women were inevitably dependent.<sup>160</sup> The law can only routinize nonmarital relationships if it acknowledges the reasons intimate partners do not marry.<sup>161</sup>

The demographic reality is that nonmarital relationships exist on a continuum.<sup>162</sup> Legal presumptions of formal equality between married and unmarried couples coerces heterogeneous couples into homogenous relationships. As a practical matter, this means the law should facilitate rather than impose nonmarital agreements, and it should encourage the voluntary assumption of shared responsibilities.

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160. The Supreme Court struck down such a presumption about marriage in *Orr v. Orr*, 440 U.S. 268, 271 (1979).

161. For unmarried biological parents, pressure is building to institutionalize equality in parents' ongoing contact with children following dissolution of the adult relationships. *See, e.g.*, Huntington, *supra* note 13, at 225–31.

162. This is true for parenting relationships as well. *See Nonmarriage, supra* note 8, at 79.